

RES IPSA LOQUITUR IN OHIO — DOES ANY "THING" OR "CONTROL" SPEAK FOR ITSELF?

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The author reviews recent developments involving res ipsa loquitur, illuminates uncertainties which accompany the doctrine and suggests consideration of the separate "duty of control" standard as an alternative approach in certain fact situations which frequently arise.

I. INTRODUCTION

Res ipsa loquitur is a classic negligence doctrine which dates back to the 19th century.¹ The general statement of the doctrine in Ohio appears in the case of *Fink v. New York Cent. R.R.*:²

In Ohio the rule of res ipsa loquitur is not a rule of substantive law but is a rule of evidence which permits the jury, but not the court in a jury trial, to draw an inference of negligence where the instrumentality causing the injury was under the exclusive management and control of the defendant and the accident occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed.³

As the *Fink* syllabus states, res ipsa loquitur establishes an inference of negligence, and when the inference is properly raised, it normally requires that the case be submitted to the jury.⁴ The doctrine is important for both parties since once a trial court determines that res ipsa loquitur applies, with rare exceptions, a directed verdict for the defendant may not be granted; the weight and effect of the inference is generally for the jury alone. The requirement of exclusive management and control set forth in the *Fink* case is not unique to Ohio. It is, however, "Perhaps the most important of the factual elements warranting application of the rule"⁵

The purpose of this article is to review recent developments, particularly in Ohio, which involve res ipsa loquitur, and analyze areas in which substantial uncertainty continues to exist. The main areas of discussion are as follows: (1) What does the "exclusive

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¹ *Byrne v. Boadle*, 2 H & C 722, 159 Eng. Rep. R. 299 (Exch. 1863).

² 144 Ohio St. 1, 56 N.E.2d 456 (1944).

³ *Id.* at 1, 56 N.E.2d at 457 (Syllabus 2).

⁴ *Id.* at 2, 56 N.E.2d at 457 (Syllabus 3).

⁵ Knepper, *Pleading in Res Ipsa Loquitur Cases*, 23 OHIO ST. L.J. 450, 451 (1962).

management and control" provision of *res ipsa loquitur* require a plaintiff to establish and, conversely, what factors, if any, must be excluded?⁶ (2) Is there a consistent body of case law establishing a uniform meaning for "exclusive control"? (3) If not, may the uncertainties in this area be avoided by reliance on case law dealing with general standards of negligence rather than this unique inference? (4) May a plaintiff plead specific acts of negligence, in addition to the general averments which invoke the desired inference of *res ipsa loquitur*? (5) May a trial court charge the jury jointly on *res ipsa loquitur* and (specific) negligence or must plaintiff elect before the case is submitted to the jury?

II. EXCLUSIVE MANAGEMENT AND CONTROL—OHIO CASES

The most serious current *res ipsa loquitur* problem in Ohio is the requirement of exclusive management and control. Since exclusive control of the particular instrumentality must be established to invoke *res ipsa loquitur*, it is incumbent upon the participants in the judicial process to predict with reasonable frequency whether exclusive control will be a problem in any given area. Unfortunately, Ohio authorities in the field are contradictory and necessitate a case-by-case review in order to impart reasonable comprehension. The certainty of *stare decisis* and the force of social change have met and locked horns over exclusive control. Reconciliation of this confrontation has not yet been realized.

In reviewing exclusive control cases in Ohio, three general questions should be kept in mind. Can the plaintiff, (1) prove what actually happened, (2) establish exclusive control and management consistent with the standards imposed by the Supreme Court of Ohio, and (3) develop a theory of negligence not dependent upon exclusive control?

If plaintiff can show what occurred the *res ipsa loquitur* doctrine is not necessary but may be attractive since it generally requires submission of the case to the jury. Conversely, since the existence of an exclusive control problem means that the application of *res ipsa loquitur* in a particular fact situation is doubtful in Ohio, other approaches and precedents should be considered. The modern judicial interpretation of the requirements for exclusive control began in Ohio in the late 1940's with the case of *Rennekar v. The Canton Terminal Restaurant, Inc.*,⁷ which was followed by *Soltz v. Colony Recreation Center*⁸ and *Koktavy v. United Fire-*

⁶ 144 Ohio St. 1, 56 N.E.2d 456, 457 (1944) (Syllabus 2).

⁷ 148 Ohio St. 119, 73 N.E.2d 498 (1947).

⁸ 151 Ohio St. 503, 87 N.E.2d 167 (1949).

works Mfg. Co.,⁹ all three cases should be considered together.

In these cases, the trial courts directed a verdict for the defendant and determined, as a matter of law, that *res ipsa loquitur* did not apply. Three different courts of appeal reversed, but the Ohio Supreme Court in turn reversed the appellate courts and held that *res ipsa loquitur* did not apply. Rather obviously, this process did not involve a liberalization of the requirements of exclusive control. This should be borne in mind because there are statements in later opinions that attempt to harmonize the earlier decisions with current ones. This goal is not attainable, for *Rennekar*, *Soltz* and *Koktavy* are conservative and consistent decisions. If *stare decisis* were to be rigidly followed, the law of exclusive control was clearly established in Ohio by 1954.

In *Rennekar*, plaintiff, entering a bus terminal, stepped into a manhole near the entrance to the terminal. Judge Zimmerman, speaking for a unanimous court, held that *res ipsa loquitur* did not apply since the manhole cover was in a public sidewalk and the defendant merely subleased the space beneath it. Thus defendant did not exclusively control the source of injury. Syllabus 2 of the decision states that, "*Res ipsa loquitur* does not apply . . . where it is apparent that the displacement could have been due as well to the intervention of an outside force or of a third person as to any negligence of the defendant."¹⁰ The case generally restates the *Fink* rule with reference to the application of *res ipsa loquitur* in Ohio.¹¹

In *Soltz* a fire damaged the plaintiff's building. At the time of the fire, the defendants occupied a portion of the basement in which they operated bowling alleys, and a fire originated in a room in their portion of the building. At that time, two employees of the defendants were alone in this room and were refinishing bowling pins. This process involved the use of an inflammable liquid.¹² Notwithstanding the defendant's close involvement with the sources of potential danger at the time of the fire, the court ruled that this was not a proper case in which to invoke *res ipsa loquitur*. Judge Taft, as spokesman for the court commented that, "It is well known that fires are of uncertain origin and may result from many causes other than negligence."¹³ This would seem to pre-

⁹ 160 Ohio St. 461, 117 N.E.2d 16 (1954).

¹⁰ 148 Ohio St. 119, 73 N.E.2d 498 (1947) (Syllabus 2).

¹¹ *Id.* at 119, 73 N.E.2d at 498 (Syllabus 1).

¹² 151 Ohio St. 504, 87 N.E.2d at 168.

¹³ *Id.* at 512, 87 N.E.2d at 172.

clude the application of *res ipsa loquitur* to virtually any fire case in Ohio. A fire of certain origin would not necessitate *res ipsa loquitur*, and a fire of uncertain origin would not establish exclusive control on behalf of the defendant.

In *Koktavy* an aerial bomb exploded two months after the defendant, a wholesale supplier, delivered it to a retail jobber who then stored it in a warehouse. This case, by any standard, would appear difficult for the claimant. The supreme court, with one judge dissenting,¹⁴ declined to invoke *res ipsa loquitur*. The decision contains interesting and important language. Syllabus 1 states that, "Ordinarily, the rule of *res ipsa loquitur* is not applicable . . . unless such party had exclusive possession, control and management of the instrumentality at the time it caused the injury."¹⁵ (Emphasis added.) The requirement of possession is new and would seem to further minimize the use of the doctrine in cases where the defendant does not directly control all factors relating to the instrumentality at the time the event occurs. However, the use of the term "ordinarily" is also new and, as will be demonstrated, it implied the existence of an exception to the general rule which was adopted by the court in *Schafer v. Wells*.¹⁶ One appellate court termed *Koktavy* "A major change in Ohio Law," and stated that Syllabus 1 "was in contrast to the usual Ohio statement that exclusive control and management by the defendant was required."¹⁷ To this writer, it appears entirely consistent with its predecessors.

Koktavy was followed by *Schafer v. Wells*. After the decision in the latter case, the meaning of exclusive control in Ohio is unclear. *Schafer*, like *Soltz*, involved a fire. The defendant had been engaged in repairing plaintiff's oil furnace which was on the plaintiff's property. The defendant completed the repairs and left plaintiff's premises at 4:00 p.m. At 5:30 p.m., the building was discovered to be on fire. The plaintiff's garage, where the fire occurred was open to easy access through a doorway (having no door) and a window opening (containing no window). Irrespective of plaintiff's

¹⁴ Judge Zimmerman's dissent does not establish any new or different standards. Compare Judge Zimmerman's statement, 160 Ohio St. 461, 471, 117 N.E.2d 16, 22, (1954) "that plaintiff traced with a satisfactory degree of thoroughness, the history of the bomb" with Syllabus 2 of the court which stated that the absence of nonaccess evidence was fatal.

¹⁵ *Id.* at 461, 117 N.E.2d at 16.

¹⁶ 171 Ohio St. 506, 172 N.E.2d 708 (1961).

¹⁷ *Cusumano v. The Pepsi-Cola Bottling Co.*, 9 Ohio App. 2d 105, 110, 223 N.E.2d 477, 481 (1967).

testimony that no one entered the garage after defendant's departure, the problem of nonexclusive control and management of the source of danger, as raised in *Koktavy*, would seem formidable. Nevertheless, the court held, by a four to three majority, that *res ipsa loquitur* applied and reinstated a verdict for plaintiff which had been promulgated by the lower court. Judge Herbert reasoned for the majority that the term "ordinarily" as used in *Koktavy*, "did not require continuing 'control and management' between that of the defendant and the cause of the injury."¹⁸ Judge Taft succinctly pointed out in his dissent that this case appeared to be controlled by *Soltz*. Indeed, his dissent went so far as to state that an inference of negligence "would have been far more justifiable"¹⁹ in *Soltz* than in *Schafer*.

As a matter of case uniformity, the dissent was undoubtedly correct. The fire in *Schafer* was as uncertain in origin as the fire in *Soltz*. But many writers in the tort field had seen fit to criticize what they believed to be an overstrict interpretation of exclusive control.²⁰ Harper and James, Prosser, and the then contemplated RESTATEMENT (SECOND) OF TORTS²¹ would all be in accord with the majority decision in *Schafer*, and it is likely that this factor influenced the court.

It is not surprising that the cases following *Schafer* have done little to clarify this subject. The gap between the consistent, conservative (*i.e.*, inconsistent with Prosser and with Harper and James) predecessors of *Schafer* and any desired liberalization of exclusive control is so wide that any attempt to rely on *stare decisis*, absent an agreement by the entire court to reverse earlier precedent, would necessarily create confusion. One commentator has perhaps understated the matter in commenting that *Schafer*

is generally in accord with the view taken in other jurisdictions on the issue of control. However, it does appear to apply the rule of exclusive control somewhat less strictly than some of the earlier cases in Ohio.²²

Although there have been several important cases decided since *Schafer*, no consistent pattern is apparent to date. In *Huggins*

¹⁸ 171 Ohio St. 506, 512, 172 N.E.2d 708, 712 (1961).

¹⁹ *Id.* at 517, 172 N.E.2d 715.

²⁰ See 2 F. HARPER & F. JAMES, THE LAW OF TORTS 19.7 (1956) [Hereinafter cited as HARPER AND JAMES]; RESTATEMENT (SECOND) OF TORTS § 328D (1966) [Hereinafter cited as RESTATEMENT 2D]; W. PROSSER, TORTS 39 (3rd ed. 1964) [Hereinafter cited as PROSSER].

²¹ *Id.*

²² Knepper, *supra* note 5, at 453.

v. *Morrell & Co.*²³ a unanimous court held that *res ipsa loquitur* did not apply to litigation involving the bottling of pigs feet, where the jar in question had passed through the possession and control of a series of defendants. The court again had to reverse a court of appeals and reinstate the decision of the lower court which had sustained a demurrer to the petition. The status and meaning of *Schafer* were clearly in question following *Huggins*. That case contains extraordinary dicta with reference to the requirements which must be satisfied for a litigant to rely on *res ipsa loquitur*.²⁴ These requirements have never been followed and would require a detailed enumeration of the factors establishing *res ipsa loquitur* and exclusive control. Fortunately, this language has now been clarified by the court in *Oberlin v. Friedman*,²⁵ and it is now clearly recognized that the inference of *res ipsa loquitur* may be raised from the evidence in the case, irrespective of the contents of the pleadings.

Subsequent to *Oberlin*, *Price v. Dot's Super Market, Inc.*²⁶ presented a difficult factual pattern for the application of *res ipsa loquitur*. The defendant owned a supermarket which was being extensively remodeled at the time of plaintiff's mishap. Flooring had been removed and then temporarily replaced. At the suggestion of the contractor, defendant endeavored to attach cleats to the individual boards in order to keep them stationary, since the store remained open during remodeling, and substantial numbers of customers walked over the previously loosened boards. Plaintiff was injured when one of the boards gave way causing her to fall into the aperture thus created. The majority of the court applied *Renneckar*, without any mention of *Schafer*, and reasoned that it was as reasonable to infer that the board was dislodged by the act of a customer as to "infer negligence on the part of the defendant." The court then held that the "possibility of two reasonable inferences precludes application of the *res ipsa loquitur* doctrine."²⁷ (Emphasis added.) Judge Herbert's dissent, however, discussed exclusive control in new terms, stating it had come to mean "power or right to control and the opportunities to exercise that control . . ."²⁸

²³ 176 Ohio St. 171, 198 N.E.2d 448 (1964). The *Huggins* case also involved a joinder question which has now been resolved by the repeal of OHIO REVISED CODE § 2309.06. For this reason, Judge Herbert concurred in the decision.

²⁴ *Id.* at 183, 198 N.E.2d at 456.

²⁵ 5 Ohio St. 2d 1, 213 N.E.2d 168 (1965).

²⁶ 177 Ohio St. 122, 203 N.E.2d 113 (1964).

²⁷ *Id.* at 124-125, 203 N.E.2d at 115.

²⁸ *Id.* at 128, 203 N.E.2d at 117.

Judge Herbert cited Harper and James, Prosser, and the (then) tentative draft of the RESTATEMENT (SECOND) OF TORTS to support his reasoning. As for Ohio precedents, he was confined to *Schafer* and the overruling of the motion to certify in *Cusumano v. Beverages, Inc.*,²⁹ which will be discussed below. He commented that

Admittedly, the element of 'exclusive control' was strictly construed during the original development of the doctrine of res ipsa loquitur. The modern trend of authorities, however, reject such strict interpretation. . . . Further, this court has rejected any such strict construction.³⁰

In the limited context of res ipsa loquitur, *Price* seems to be governed by *Renneckar*, since third persons came into contact with the instrumentality in question. An alternative theory, however, might have avoided the problems presented in *Price*. There are some circumstances under which an owner of property has the duty to control his property in order to safeguard visitors. This body of case law is not dependent upon res ipsa loquitur and thus does not require an attempt, as in *Price*, to avoid contrary case precedents. Cases in Ohio and elsewhere have held that an owner is required to control his own instrumentalities. The owner of a business establishment who keeps his doors open during remodeling reasonably owes a duty to invitees to be sure that the boards in his floor are firmly attached. This duty is created by control or ownership of an instrumentality which has the capacity to be dangerous, not by an unexplained event which necessitates an inference based on the assumption that only the defendant may control or contact the instrumentality. Hundreds of customers patronize a supermarket. Any one of them may kick or loosen an unattached floor board, thus raising equal and opposing reasonable inferences tending to nullify exclusive control. This duty to control requires a defendant to maintain property or chattels in such a fashion that third parties who, by common expectation, come into contact with the property will not be injured. *Price* could be most effectively presented in terms of duty to control, not res ipsa loquitur. Use of the duty to control doctrine would minimize the conflict which exists with reference to *Schafer* and its predecessors.

The Supreme Court returned to the res ipsa loquitur doctrine

²⁹ 117 Ohio St. 100, 202 N.E.2d 628 (1964).

³⁰ 117 Ohio St. at 127, 203 N.E.2d at 117.

in *Oberlin v. Friedman*.³¹ The *Oberlin* decision follows the majority rule that *res ipsa loquitur* will not be applied in malpractice cases where the injury alone supports the inference of negligence.³² The main significance of the case lies in the area of pleading and its clarification of some earlier dicta. The court held that *res ipsa loquitur* "may be applied even though the petition also alleges and evidence is offered to prove specific acts of negligence."³³ But in discussing exclusive control problems raised in the case, Chief Justice Taft indicated the restrictions imposed by *stare decisis* and the lack of interest by a majority of the court in modifying those views.

A recent exclusive control case which did not reach the supreme court raised the problem frequently encountered by a substantial delay between the manufacturing process and injury.³⁴ In this case a Pepsi-Cola carton was delivered and taken directly to the plaintiff's storeroom by defendant's driver, who placed the newly delivered cases on top of cartons remaining from previous deliveries. Two days later, plaintiff endeavored to lift the top case off the stack; the bottom fell out, and plaintiff was injured. Plaintiff testified that no one had contacted the cartons between the time of delivery and injury. *Cusumano* presents a very difficult fact situation for application of *res ipsa loquitur*. The defendant neither possessed nor managed the cartons after delivery; the possibility of opposing causative factors was apparent. As noted, the defendant had no duty to control, since one who delivers a soft drink cannot regulate the operation of his customer's storeroom.

The extraordinary history of the case demonstrates the difficulties which exist in this area. The accident occurred in 1959. When the case was first tried, the trial court directed a verdict for the defendant at the close of plaintiff's case. The appellate court reversed and found that "the doctrine of *res ipsa loquitur* is clearly applicable,"³⁵ without any discussion of *res ipsa loquitur* or the supreme court precedents. The supreme court refused to certify the case.³⁶ At the second trial, the judge charged the jury on *res ipsa loquitur*, and a verdict was rendered against defendant. In a

³¹ 5 Ohio St. 2d 1, 213 N.E.2d 168 (1965).

³² See *Ybarra v. Spangard*, 25 Cal.2d 489, 154 P. 2d 687 (1954) and comment thereon at 9 A.L.R. 3rd 1327 (1966).

³³ 5 Ohio St. 2d 1, 213 N.E.2d 168, 169 (1965) (Syllabus 2).

³⁴ *Cusumano v. The Pepsi-Cola Bottling Co.*, 9 Ohio App. 2d 105, 223 N.E.2d 477 (1967).

³⁵ *Cusumano v. Beverages, Inc.*, 95 Ohio L. Abs. 131, 199 N.E.2d 130 (Ct. App. 1964).

³⁶ 117 Ohio St. 100, 202 N.E.2d 628 (1964).

second written decision³⁷ the same court of appeals reversed a second time, holding that the final argument of plaintiff's counsel constituted prejudicial error. At this juncture, the court engaged in an extensive and scholarly review of the exclusive control cases and presented an analysis which might have led to clarification had the case been reviewed by the supreme court. But due to a settlement, no motion to certify was filed with the Ohio Supreme Court. The doctrine presented by *Schafer*, *Morrell* and *Price* thus remains contradictory.

At the conclusion of its review of cases, the *Cusumano* court bravely attempted to reconcile all the significant Ohio cases involving exclusive control:

From a thorough analysis of the above cited cases, we may conclude that the trend of Ohio decisions is toward the rule that actual management and control of the injury-producing instrumentality by the defendant is usually required, [citing *Koktavy*] but if the instrumentality has been out of the defendant's possession for no more than a reasonable period of time . . . [citing *Schafer*], and the plaintiff can show that the instrumentality has not been mishandled or tampered with, [citing *Huggins*] and there is no probability that any other intervening force had an effect on the instrumentality [citing *Renneckar*], then the doctrine of *res ipsa loquitur* will be applicable.³⁸

The court then added that, "Furthermore, many prominent commentators on the doctrine of *res ipsa loquitur* advocate flexible interpretation of the element of 'control' and counsel against a rigorous enforcement of a literal interpretation."³⁹

The plaintiff in a *Cusumano*-type case will find it difficult to satisfy the requirements established by the *Cusumano* court; *i.e.*, is there no probability that any other intervening force has had an effect on the instrumentality?⁴⁰ Furthermore, the causation supported by the flexible interpretation still faces a sharply divided supreme court. The unknown factor is the degree of probability by which the chance of an intervening cause must be eliminated in a divided control case. The revised RESTATEMENT (SECOND) OF TORTS simply requires that "other responsible causes, including the conduct of the plaintiff and third persons, are *sufficiently eliminated* by the evidence."⁴¹ (Emphasis added.) Under the RESTATEMENT,

³⁷ 9 Ohio App. 2d 105, 223 N.E.2d 477 (1967).

³⁸ *Id.* at 112, 223 N.E.2d at 480.

³⁹ *Id.* at 112, 223 N.E.2d at 482. In this connection the court cited PROSSER and HARPER & JAMES; and the then adopted RESTATEMENT 2d.

⁴⁰ 9 Ohio App. 2d 105, 223 N.E.2d 477 (1967) (Syllabus 1).

⁴¹ RESTATEMENT 2d § 328D (1966).

the *Cusumano* case would be submitted to a jury. Given the Ohio precedents, however, judgment for the defendant would be likely if a case such as this were decided by the supreme court.

III. MODIFICATION OF EXCLUSIVE CONTROL

As noted previously, most commentators have indicated strong preference for modification of the exclusive control doctrine.⁴² Harper and James are unequivocal in their criticism of a strict application of the exclusive control requirement. They state,

The requirement of proof of exclusive control is immediately seen to impose too strict a burden upon plaintiffs. Exclusive control may have the required logical tendency, but there are also many other ways (not involving exclusive control) in which the probable negligence can be attributed to the defendant. And, in effect, the courts do not generally apply this requirement as is literally stated, although mechanical insistence upon it has brought about an occasional restrictive result . . . the fallacy of the 'exclusive control' test is seen in many situations where the doctrine is unhesitatingly applied despite absence of 'control'.⁴³

The RESTATEMENT draft, urged by Judge Herbert in *Price*, has now been adopted in the revised RESTATEMENT (SECOND) OF TORTS.⁴⁴ The pertinent subsection is, of course, section 328D(1) (b) which requires "sufficient elimination" of "other responsible causes, including the conduct of the plaintiff and third persons" This revised language completely discontinues use of the exclusive control standard and requires merely a rational elimination of other opposing explanations. The official comments to the RESTATEMENT would seem to indicate that the requirement is really that of a logical probability. If plaintiff establishes that it is more probable that his harm was caused by the defendant's negligence than by the conduct of third persons, the case should

⁴² HARPER AND JAMES, PROSSER, and RESTATEMENT 2D.

⁴³ HARPER AND JAMES, at 1085-1087.

⁴⁴ § 328D. Res Ipsa Loquitur.

- (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
 - (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
 - (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; (Emphasis added.) and
 - (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

be submitted to the jury.⁴⁵ In this connection the RESTATEMENT utilizes the driverless vehicle hypothetical, which will be discussed below, and notes that when a car runs down a hill two minutes after being parked by its owner,

In the absence of other evidence, the explanation is possible that some meddling stranger has tampered with the car, or that it has been struck by another vehicle. It may, however, be reasonably inferred that, more probably than not, the event occurred because of the negligence of A in parking the car.⁴⁶

Even blanket use of the RESTATEMENT language will not avoid difficulties in promulgating a uniform body of decisions on anything other than an ad hoc basis. The distinctions between a mere possibility and a reasoned probability are not governed by scientific precision. In any event, the writers of the RESTATEMENT have demonstrated their own desire to avoid continued use of the exclusive control standard.⁴⁷ Section 328D is so new that it is difficult to predict how widely it may be adopted by courts considering exclusive control problems. The only specific application of section 328D mentioned in the RESTATEMENT itself was from a dissenting opinion.⁴⁸

At this point clarification in Ohio is badly needed. First, it must be determined in a borderline case similar to *Cusumano*, which does not directly fall into a previously litigated category, whether exclusive control means complete control or something like the sufficient elimination standard of the revised RESTATEMENT (SECOND) OF TORTS. Second, the affirmative duty to control doctrine, previously alluded to in the discussion of *Price*, can mitigate some of the problems raised by exclusive control and should be utilized in fact situations to which it is properly applicable.

(2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.

(3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached.

⁴⁵ RESTATEMENT 2d § 160, comment on Clause (b) of Sub-sec. (1).

⁴⁶ *Id.*

⁴⁷ *Id.* § 160 comment g:

It is not, however, necessary to the inference that the defendant have such exclusive control; exclusive control is merely one way of proving his responsibility . . . if it can be established otherwise, exclusive control is not essential to a *res ipsa loquitur* case. The essential question becomes one of whether the probable cause is one which the defendant was under a duty to the plaintiff to anticipate or guard against.

⁴⁸ *Milligan v. Coca-Cola Bottling Co. of Ogden*, 11 Utah 2d 30, 354 P.2d 580, 583 (1960). Obviously, the annotation is not current since Judge Herbert, as indicated above, cited the RESTATEMENT 2d's draft in *Price*.

IV. DUTY TO CONTROL—MOVING VEHICLES

A review of cases involving moving vehicles can aptly demonstrate the confusion created when the distinction between *res ipsa loquitur* and affirmative duty to control is not clearly kept in mind. This review will also indicate the availability in cases presenting occurrences of uncertain origin of helpful doctrines, other than *res ipsa loquitur*.

Res ipsa loquitur has been frequently applied in Ohio and other jurisdictions in moving vehicle cases. Courts generally have reasoned that since automobiles do not ordinarily move about of their own volition, the fact that one has moved and caused an injury while under the defendant's control justifies inferring negligence in the absence of other explanatory evidence.⁴⁰

Hudson v. Bennett,⁵⁰ an appellate court case decided after *Soltz* and before *Koktavy*, would appear to be in conflict with both of those decisions.⁵¹ Here, the defendant was conducting an auction of automobiles owned by various third parties; he parked the cars on a hill and set the brakes but left the keys in the ignition. The cars were not owned by defendant; they were consigned for the auction and returned to their owners at the conclusion of the auction if not sold. Prospective purchasers were accorded the privilege of examining the cars, starting the motor and driving the cars. Plaintiff was driving along the highway adjacent to the property in question and was struck by a driverless vehicle which had coasted down the hill from defendant's parking lot. Plaintiff could not prove who had parked the automobile. Nevertheless, the court upheld a verdict for plaintiff for 1,200 dollars for property damages, holding that *res ipsa loquitur* applied.

The decision of the court is interesting because it partially recognizes the duty to control rationale but fails to separate that doctrine from *res ipsa loquitur*.⁵² The court reasoned that the defendant company was obligated to exercise proper care in that

⁴⁰ See Annot., 16 A.L.R.2d 979, 984 (1951). In *Ohio*, the syllabus in *Ice Cream Co. v. Call*, 28 Ohio App. 521, 162 N.E. 812 (1928), states that:

Where a loaded automobile truck, while on owner's business, runs wild without a driver, causing injury and damage, the doctrine of *res ipsa loquitur* applies, rendering such owner liable for damage caused by the runaway truck.

⁵⁰ 94 Ohio App. 329, 115 N.W.2d 20 (1952).

⁵¹ "Liberties with 'exclusive control' were also taken by the appellate court in *Hudson v. Bennett*." *Survey of Ohio Law 1953: Res Ipsa Loquitur*, 5 W. RES. L. REV. 315 (1953).

⁵² Cf. *Price v. Dot's Super Market, Inc.*, 117 Ohio St. 122, 125, 203 N.E.2d 113, 115 (1964) (dissenting opinion of Herbert, J.).

they had the sole right and control over the use of the vehicles. The fact that the company had no knowledge of who actually failed to set the brakes was deemed irrelevant in view of the company's implied control of the automobile and apparent opportunity to prevent mishaps.⁵³ Whether the court was thinking in terms of exclusive control or exclusive right and duty to control is impossible to ascertain from the wording of the decision. This decision is consistent in its holding with decisions based upon duty to control. But since the defendant did not have exclusive control of the automobile involved, the case is not consistent with Ohio *res ipsa loquitur* decisions. The supreme court denied a motion to certify the case, which is unfortunate from the standpoint of uniformity since that court would probably have followed *Soltz* and *Rennecker* by reversing the decision of the lower court and granting judgment for the defendant.⁵⁴

Review of decisions from other jurisdictions is helpful at this point. *Litos v. Sullivan*⁵⁵ illustrates complete reliance on the duty to control doctrine. Defendant parked his car on a fifteen percent grade at 10 a.m. in the morning. Between 1 and 2 p.m. defendant noticed, while passing his car, that one of his rear tires was flat. He had it repaired immediately by a garage repairman. At approximately 3:30 p.m., the automobile coasted down the hill and struck plaintiff. At trial, verdicts were rendered against both the owner and the garage. Although the logic of the decision to exonerate the garage would seem open to question, the decision is significant since it deals entirely with the duty to control and does not mention *res ipsa loquitur*. The court held that one who parks a car where it might tend to move has the duty to see that the car is properly secured. Since the decision deals with specific (non-inferential) negligence and the only evidence with respect to parking the car was that offered by the owner who testified that he cautiously parked the car in reverse and cramped his wheels, the court permitted the jury to disbelieve the only direct evidence and to infer specific negligence (*i.e.*, failure to properly park) from the actual fact of the rolling car.⁵⁶

Cases involving garages who have temporary custody of automobiles, brought in for service, also apply the duty to control

⁵³ *Hudson v. Bennett*, 94 Ohio App. 329, 333-34, 115 N.E.2d 20, 22-23 (1952).

⁵⁴ *Ice Cream Co. v. Call*, 28 Ohio App. 521, 162 N.E. 812 (1928). It is interesting to note that the older *Call* decision, also involving a rolling vehicle, would seem to fall more appropriately into the duty of control category.

⁵⁵ 322 Mass. 193, 76 N.E.2d 557 (1947).

⁵⁶ *Id.* at 195, 76 N.E.2d at 558.

doctrine. For example, in *Humble Oil & Refining Co. v. Martin*⁵⁷ a customer of a service station brought a car in to be serviced. She testified at the trial that she parked the car, placed it in gear and left. Neither defendant nor any of its agents in any way moved or touched the car before it rolled out of the service station and struck plaintiff. The court held that although no control had been exercised over the vehicle, defendant had the affirmative duty to check the car and to make sure that it was securely braked.⁵⁸ In effect, the decision applies the doctrine of strict liability: One who works on cars cannot rely upon their owners to properly secure them and must take affirmative action to prevent them from injuring third parties.

Another area of significant development concerning moving vehicles involves what might be colloquially termed as the "picnic grove" cases. In *Marquardt v. Orlowski*⁵⁹ the accident occurred at a crowded picnic ground over the Fourth of July weekend. Defendant *A* arrived and parked his car on a hill pursuant to the direction of the owner of the picnic grove, defendant *B*, who made a charge of one dollar for this parking privilege. Thereafter, and while defendant *A* was at his picnic table, his four year old daughter climbed into the unlocked automobile and apparently disengaged the gears. The car, daughter aboard, rolled downhill and struck plaintiff, resulting in the loss of plaintiff's leg. The court held the owner of the picnic grove, defendant *B*, liable to plaintiff for their "total failure to provide a safe parking place . . . or to take any measures directed toward proper supervision, direction and control of auto parking."⁶⁰ The decision again imposes a high duty of care on an owner of property whose business it is to permit motor vehicles to be parked or utilized on his property. The evidence indicated that the hand brake on the car was inoperative and had not been set by defendant *A*. Nevertheless, the court judicially noticed that the practice of "hillside" parking lot owners was to utilize barriers, such as logs and railroad ties, to prevent vehicles from rolling.⁶¹

The *Orlowski* reasoning has been adopted by the Court of Appeals for Columbiana County in *Holdshoe v. Whinery*,⁶² which involved a similar fact situation. That court, citing *Orlowski*, held that parking of vehicles on an incline was a potential hazard and

⁵⁷ 148 Tex. 175, 222 S.W.2d 995 (1949).

⁵⁸ *Id.* Syllabi 3 and 4.

⁵⁹ 18 Ill. App. 2d 135, 151 N.E.2d 109 (1958).

⁶⁰ *Id.* at 142-45, 151 N.E.2d at 113-14.

⁶¹ *Id.* at 144, 151 N.E.2d at 114.

⁶² 8 Ohio App. 2d 305, 222 N.E.2d 435 (1966).

the owner of this hilly terrain was obligated to provide adequate safety features in his lot.⁶³ Defendant charged visitors fifty cents for the use of picnic tables but made no general charge for admission to his property upon which other facilities were located. No separate, distinct parking area was provided for picnic patrons. Thus, individual picnickers generally parked adjacent to their own tables. In *Orlowski*, a one dollar charge was made at the time the patrons were admitted to the grounds and there was some testimony, in that case, to the effect that the attendant told defendant, at least in a general sort of way, to park on the hill. The petition in *Holdshoe*⁶⁴ was phrased entirely in terms of specific negligence and charged the defendant with six distinct negligent acts. Neither the trial court nor the court of appeals made any reference to *res ipsa loquitur* in promulgating their respective decisions.

Although the picnic grove decisions represent minority law, they seem harmonious with the reasoning behind the duty to control doctrine. The Supreme Court of Ohio has certified *Holdshoe* and, although the court of appeals' decision does not deal with *res ipsa loquitur*, its eventual disposition may indicate the predilections, if any, of the supreme court to modify its restrictions on exclusive control.* It would appear somewhat inconsistent to continue confining exclusive control in the *Price* mold to definite certainty if the analogous duty to control doctrine is to be extended to the outer perimeter represented by *Holdshoe*. Nevertheless, it is important to recognize that the *Holdshoe* fact situation should logically be discussed solely in terms of duty to control.

V. DUTY TO CONTROL—MISCELLANEOUS

Recent decisions on subjects other than moving vehicles demonstrate the distinction between *res ipsa loquitur* and the duty to control doctrines and the importance of recognizing the existence of the latter doctrine. In jurisdictions other than Ohio, cases concerning fires have involved both modifications of the exclusive control requirement and occasional recognition of the duty to control.⁶⁵

*Dubuque Fire & Marine Insurance Co. v. Union Compress & W. Co.*⁶⁶ indicates the difficulty in attempting to separate *res ipsa loquitur* and duty to control. In *Dubuque*, the fire occurred in stor-

⁶³ *Id.* at 310, 222 N.E.2d at 439.

⁶⁴ See Supreme Court of Ohio, Case No. 40,782 (filed Feb. 21, 1967) and, particularly, Appellant's brief therein.

⁶⁵ See Annot., 8 A.L.R. 3d 974, 999 nn. 12 & 13 (1966); *Oakdale Building Corporation v. Smithereen Co.*, 322 Ill. App. 222, 54 N.E.2d 321 (1944).

⁶⁶ 143 F. Supp. 128 (W.D. La. 1956).

* Ct. of App. affirmed by Su. Ct. in 14 Ohio St. 2d 134 (May 1968).—Ed

age barns and destroyed 500,000 dollars worth of cotton. The fire was apparently caused by spontaneous combustion in the bales of stored cotton. The district court applied *res ipsa loquitur*, although individuals other than agents of defendant had free access to the barns, finding "that this is a classic case of application of the doctrine."⁶⁷ But the court immediately hedged its categorical selection of a "classic" doctrine by asserting that even if they were mistaken in applying the doctrine, there was sufficient evidence to show that defendant had been negligent in failing to properly patrol the building aisles and remove "fire bales."⁶⁸

Res ipsa loquitur has also been utilized to impose liability upon bailors of motor vehicles. The courts often speak in terms of raising an inference of negligence when there is a duty owing not to permit a defective vehicle to be operated by another.⁶⁹ Many of these cases appear to inadvertently combine *res ipsa loquitur* and the affirmative duty to control. Contrast this with *Dubuque*, which clearly recognized the distinction between specific negligence and the inference of general negligence. As indicated above, section 328D of the RESTATEMENT (SECOND) OF TORTS mentions the scope of the defendant's duty to plaintiff but solely within the context of *res ipsa loquitur*. One might question whether the RESTATEMENT recognizes the distinction between *res ipsa loquitur* and duty to control.

*Yarbrough v. Ball U-Drive System*⁷⁰ is a leading bailment case in which plaintiff's decedent was killed when the rear end of a leased truck flew into the air causing the truck to overturn. The court held that there was ample proof to submit the case under *res ipsa loquitur*, logically finding that one renting automobiles or vehicles "represents that the vehicles are in good mechanical condition."⁷¹ The court's decision, however, is phrased entirely in terms of *res ipsa loquitur* rather than in the more appropriate context of duty to control. This treatment necessitated a somewhat artificial disposition of the exclusive control requirement, which would not have been necessary if the case had been determined by the more obvious duty to control doctrine.

There are, of course, some areas in which either relaxation of the exclusive control test, or application of the duty to control doctrine, are more proper than others. One of the most controversial subjects involves suits against hospitals, particularly those involving

⁶⁷ *Id.* at 134.

⁶⁸ *Id.* at 135-36.

⁶⁹ See Annot., 46 A.L.R.2d 404, 411 (1956).

⁷⁰ 48 So. 2d 82 (Fla. 1950).

⁷¹ *Id.* at 83.

simultaneous care and treatment, as in an operation by a team of doctors and nurses who may or may not be employees or agents of each other or the hospital in question.⁷² This field has created abundant litigation.⁷³ One commentator found a "considerable relaxation, in hospital injury cases as to what constitutes an 'instrumentality' or its 'control,' for purposes of the new *res ipsa loquitur* rule."⁷⁴ An older example of this relaxing influence is *Ybarra v. Spangard*.⁷⁵ In that case plaintiff noticed a sharp pain between his neck and shoulder following an appendectomy. He was unable to even tentatively identify the instrumentality, doctor, nurse, or anaesthesiologist who presumably created the pain. The Supreme Court of California held it was sufficient for the plaintiff to show injury resulting from an external force which had been applied while he was unconscious since this was "as clear a case of identification of the instrumentality as the plaintiff may ever be able to make."⁷⁶

The difficulties in providing reasonable certainty can be seen by considering *Rinkel v. Lee's Plumbing & Heating Co.*⁷⁷ This decision predates the RESTATEMENT (SECOND) OF TORTS and its drafts, but it relies upon and adopts language similar to section 328D.⁷⁸ In *Rinkel* plumbing was installed in a home in April. In December some of the new fixtures burst while the owners were absent on vacation. Suit was instituted against the plumbing contractor.

Held, although other causes could conceivably have caused the separation of the pipes, under the circumstances here, the probability of this was not greater than nor equal to the probability that negligence in installation by defendant's employee ultimately caused the separation.⁷⁹

This court merely required the plaintiff to reasonably eliminate other causes, and held that "exclusive control in the defendant is not necessarily a prerequisite to the application of *res ipsa loquitur*."⁸⁰ The court cited an earlier Minnesota decision and concluded

⁷² The leading Ohio case is *Oberlin v. Friedman*, 5 Ohio St. 2d 1, 213 N.E.2d 168 (1965).

⁷³ See Annot., 9 A.L.R. 3d 1315 (1966).

⁷⁴ *Id.* at n. 1321.

⁷⁵ 25 Cal.2d 486, 154 P.2d 687 (1944).

⁷⁶ *Id.* at 493, 154 P.2d at 690-91.

⁷⁷ 257 Minn. 14, 99 N.W.2d 779 (1959).

⁷⁸ *Id.* at 18, 99 N.W.2d at 782.

⁷⁹ *Id.* at 14, 99 N.W.2d at 780 (Syllabus 2).

⁸⁰ *Id.* at 18, 99 N.W.2d at 782.

that the decision as to when *res ipsa loquitur* should be applied is "largely a question of how justice in such cases is most practically and fairly administered."⁸¹

VI. PRACTICAL TRIAL PROBLEMS

There are two other problems which relate to previous examples and merit brief discussion: May a pleader rely on *res ipsa loquitur* if he pleads specific acts of negligence? If so, may such pleader successfully request the trial court to charge the jury simultaneously on (a) the inference created by *res ipsa loquitur* and (b) specific doctrines of negligence raised by the pleadings, such as the duty to control? The answer to the first question in Ohio, as elsewhere, is clearly in the affirmative.⁸² The answer to the second question is undetermined.

As noted above, *Oberlin* expressly holds that *res ipsa loquitur* may be applied "even though the petition also alleges and evidence is offered to prove specific acts of negligence."⁸³ The *Oberlin* case required the disapproval of previous dictum in *Winslow v. Ohio Bus Line Co.*⁸⁴ and clarified an area which, at that time, was still in doubt. Part of the confusion prior to *Oberlin* was created by a statement in Ohio Jurisprudence, Second which stated, "The doctrine [of *res ipsa loquitur*] is inapplicable where the complaint alleged and plaintiff affirmatively attempted to show how his injuries were inflicted."⁸⁵ As evidenced by the footnote which purports to support it, that sentence is based upon a misinterpretation of *Seiling v. Mahrer*.⁸⁶ In that case, the court declined to apply *res ipsa loquitur* in a medical malpractice action and followed the general rule to the effect that *res ipsa loquitur* does not apply to this subject matter. Thus *Seiling* applies only in a narrow area and should not be cited, without clarification, as supporting a general rule.⁸⁷

There is a surprising absence of either case precedent or scholarly comment dealing with the subject of proper instructions

⁸¹ *Peterson v. Minnesota Power & Light Co.*, 207 Minn. 387, 391, 291 N.W. 705, 707 (1940).

⁸² *Oberlin v. Friedman*, 5 Ohio St. 2d 1, 213 N.E.2d 168 (1965).

⁸³ *Id.* Syllabus 2.

⁸⁴ 148 Ohio St. 101, 73 N.E.2d 504 (1947).

⁸⁵ 39 O. JUR. 2d *Negligence* § 159 (1959).

⁸⁶ 71 Ohio L. Abs. 571, 113 N.E.2d 373 (Ct. App. 1953).

⁸⁷ Cases prior to *Oberlin* permitted joint pleading of *res ipsa loquitur* and specific negligence. See *Williamson v. Jones & Laughlin Steel Corp.*, 213 F.2d 246 (6th Cir. 1954); *Joyce v. Union Carbide & Carbon Corp.*, 144 Ohio App. 51, 173 N.E.2d 692 (1961).

to the jury in cases that involve simultaneous application of *res ipsa loquitur* and specific acts of negligence. Clearly, in Ohio the right to rely on *res ipsa loquitur* is not precluded by pleading and endeavoring to prove specific acts of negligence. There is, however, real question as to whether the case may be submitted to the jury on both issues. The better position is that the case can be submitted to the jury on the issues of *res ipsa loquitur* and specific acts of negligence.

If an election were required, several practical problems would be raised. First, if an election between the issues were required when would the election be made? If the plaintiff had to elect before resting his case he might not know at that time whether the court would submit the case on *res ipsa loquitur*. Accordingly, if the election were to select *res ipsa loquitur*, a bad guess would result in a directed verdict. Second, although the pleadings are no longer submitted to the jury, reference is frequently made to them during the trial and most particularly, during the court's charge. If the plaintiff were required, in effect, to elect *res ipsa loquitur* and drop his claims of specific negligence, the court or counsel might well comment on that subject. The jury might then infer that the plaintiff's entire action was groundless since not all of his claims could be substantiated.

Since *res ipsa loquitur* is an inference, it is reasonable to permit that inference to be supported or weakened by all of the relevant evidence submitted during the trial, including specific acts of negligence. Conversely, it is unreasonable for a jury to be required to consider that inference in a vacuum, without the supporting evidence which endeavors to indicate precisely what the defendant failed or neglected to do. Under the approach of submitting both issues to the jury the charge would be:

You are instructed that this case is an action in which the doctrine of *res ipsa loquitur* might be applied. The words, '*res ipsa loquitur*', mean the 'thing itself speaks'. In other words, the rule of *res ipsa loquitur* means that the circumstances involved in or connected with an accident may be of such unusual character as to justify, in the absence of any other evidence bearing on the subject, the inference that the accident was due to negligence because, in the absence of any explanation that would be a fair and reasonable conclusion.⁸⁸ You are further instructed that in considering whether that inference of negligence should be applied in this case, you may consider all the evidence submitted in this action by both the plaintiff and the defendant,

⁸⁸ See 4 REID'S BRANSON INSTRUCTIONS TO JURIES—CIVIL ACTIONS § 2335, at 408 (1962).

including the evidence introduced by plaintiff dealing with the subject of specific charges of negligence and the defendant's evidence in defense thereof.

This approach is generally called the "surplus theory."⁸⁹ This doctrine has been described as the "most logical" on the ground that it recognizes the true nature of an inference, which is strengthened by the addition of other facts consistent with the inference.⁹⁰ The previously cited *Dubuque* case⁹¹ relates to this problem; that court found a classic case for the application of *res ipsa loquitur* but alternatively found the commission of specific negligent acts.

VII. CONCLUSION

Res ipsa loquitur can continue to speak for itself when the occurrence in question is genuinely an unexplained mystery. But if the accident involves potentially dangerous items which should be controlled by their owners to prevent foreseeable injury, reliance upon *res ipsa loquitur* may be both inappropriate and confusing. The failure to exercise proper control is not an unexplained event. Liability is based upon the basic tort principle of ordinary care under all the applicable circumstances, not upon reliance on a legalized latin proverb which was developed to prevent injustice in cases where affirmative evidence was not available.

Res ipsa loquitur will continue to be an important tort doctrine. However, problems incidental to the application of this unique inference should be minimized by confining it to cases involving truly unexplained events. Since *res ipsa loquitur* is an old doctrine involving a substantial body of precedent, which frequently establishes strict standards of exclusive control, it may sometimes be easier to urge modification through the duty to control standard. This latter doctrine is reasonably new in most instances and often has not been recognized at all as a separate tort doctrine which establishes a standard of care on its own right. In many ways the duty to control cases appear similar to decisions in the products liability field with reference to the duty to warn.⁹² A manufacturer of products must warn purchasers of latent defects which have the capacity to cause injury when the product sold is used in a foreseeable manner. Similarly, a person who has the power to control an instrumentality which may cause injury if misused must take reasonable steps to prevent such injury.

⁸⁹ See Annot., 2 A.L.R.3d 1335, 1341 (1965).

⁹⁰ *Id.* at 1341.

⁹¹ 143 F.Supp. 123 (W.D. La. 1956).

⁹² See Annot., 76 A.L.R.2d 9 (1961).